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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 104

EDWARD A. WILD, JR. and LOUIS CORRADO,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1969

No.

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Edward A. Wild, Jr. and Louis Corrado, hereby petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered herein on October 29, 1969, which affirmed the convictions of defendants for violation of the Federal Obscenity Law (18 U.S.C. §1461) and the order denying petition for rehearing entered herein on February 2, 1970.

Opinions Below

The opinions of the Court of Appeals on the appeal and on the petition for rehearing are annexed hereto as Appendices A and B respectively. They have not as yet been reported. No opinions were rendered in the District Court except on petitioners' motion for suppression and return; a copy of this unreported opinion is annexed hereto as Appendix C.

Jurisdiction

The initial order sought to be reviewed was made and entered on October 29, 1969. Timely petition for rehearing was made on November 12th, 1969, and was denied on February 2, 1970. The statutory provision believed to confer on this Court jurisdiction to review the orders in question by writ of certiorari is 28 U.S.C. §1254 (1).

Questions Presented for Review

1. (a) Is the federal obscenity statute, when construed and applied to permit conviction in the absence of any evidence of obscenity, sale to children, or obtrusive thrusting, repugnant to the due process clause of the Fifth Amendment and the free speech provisions of the First Amendment to the United States Constitution; and (b) did the affirmance of the convictions below, in the absence of such evidence, deprive petitioners of liberty and property without said due process and of their First Amendment rights to freedom of speech and press, especially when the male homosexual group, to which the allegedly obscene material was addressed, concededly found the material "not obscene" and "quite nice", and had invited the receipt of such materials?

2. If conviction may normally not be had constitutionally under such circumstances, may such convictions be affirmed solely upon the determination of the appellate court that the materials involved constituted hard core pornography, without any supporting evidence except the materials themselves,—or does such determination and affirmance deprive petitioners of the aforesaid constitutional rights?

3. May federal obscenity convictions be upheld when the jury is charged that, in determining whether the slides involved were obscene, it could consider as a relevant factor whether, in distributing brochures therefor, defendants "* * * were trying to reach people to look at the slides, these very offensive slides * * *", solely because no objection was made to such charge at the trial?

4. May slides, brochures and other material,—constituting everything related to the defendants' business of making, reproducing, advertising and distributing slides, magazines and photographic reproductions,—be searched for and seized without warrant and substantial parts thereof introduced in evidence thereafter against defendants in a federal criminal obscenity trial, and the defendants arrested, all without any prior adversary judicial determination of obscenity of the materials identified in the indictment or those seized as incident to the arrest, especially in the complete absence of any procedure for ever securing the return of nonobscene materials, without violating the First, Fourth and Fifth Amendment rights of such defendants?

5. Does *Chimel* v. *California*, 395 U. S. 752 (1969) operate fully prospectively, or shall it be applied to the case at bar?

Constitutional Provisions and Statute Involved

The text of the federal obscenity statute is lengthy. Its pertinent text, is set forth in Appendix D hereto, together with that of the Constitutional provisions involved.

Statement of the Case

The First Indictment

Petitioners Wild and Corrado were charged in 1965 in a 33-count indictment with violations of the federal obscenity law (18 U.S.C. §1461) (Doc.2).* The first count charged conspiracy; Counts 2 through 24 charged mailings of obscene materials, while the remaining counts charged mailing of advertisements for obscene materials.

The Searches and Seizures

Appellants were arrested in their respective apartments in an apartment building on Pierrepont Street in Brooklyn where they resided, pursuant to bench warrants issued following the indictment. Postal inspectors and Deputy Marshals immediately conducted searches—without warrant—of both such apartments. In addition, they interrupted their searches to go with Corrado to a third apartment—an "office" on Hicks Street in Brooklyn—to search there, thereafter returning to the Corrado apartment where the search was completed.

The Corrado apartment was thoroughly searched (Doc. 16, p. 13); it, like Wild's (*id.* at 85), was a two-room

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* Such references are to the Documents as numbered in the original certified record on file here.

apartment with a bathroom. Officers went around the apartment and searched and touched almost everything (*id.* at 15). Corrado recalled the officers saying that "they took everything that pertains to the business * * *" (*id.* at 18).

At Wild's apartment, the officers "started gathering up various photographic equipment, slides, circulars, related things to photography and his business" (*id.* at 160). Wild's apartment was also a two room apartment with bathroom (*id.* at 161). The officers were engaged in gathering up anything relating to petitioners' business. As Deputy Marshal Sullivan testified (*id.* at 166):

> "Q. You testified that you gathered up all the various photographic equipment, being the material related to Mr. Wild's business, is that correct? A. Yes, sir.
>
> Q. You were getting evidence; that is, you were searching for evidence? * * * A. I was not searching for evidence. This was all in view. We were gathering up what was there.
>
> Q. I see. In other words, anything you saw in view you were taking in? A. Related to his business. Their photographic equipment, slides, circulars advertising his business, envelopes, things like that."

The inventories of the Postal Inspectors, listing what was taken from the Pierrepont Street apartments, showed that they included a filing cabinet containing slides and photos, a suitcase containing slides, mailing lists, a shopping bag containing circulars, eight boxes of customers' names and addresses, and three shopping bags containing slides, circulars, and correspondence. (Suppl. App. App.,

1b and 2b;[1] Govt. Exhs. 7 and 10). The materials taken at the Pierrepont Street apartments also included a "shopping bag of circulars ready for mailing", another "shopping bag filled with addressed envelopes", a Post Office Department hamper and two U. S. mail sacks containing miscellaneous photos and slides (*Ibid.*).

At the hearing on petitioners' motion to suppress and return, petitioners contended that such warrantless searches and seizures, in an obscenity case, without prior adversary judicial hearing, violated their First, Fourth and Fifth Amendment rights. The motion was denied in 1967, District Judge Murphy holding that the search at Hicks Street was consented to by Corrado, and upholding the Pierrepont Street searches as incident to lawful arrests (App. C; Doc. 17).

Prior to denial of the motion, in 1966, petitioners had been charged in an additional indictment.

The Second Indictment

The second indictment contained 14 counts, each charging petitioners with the mailing of obscene materials (Doc. 33).

In 1967, the two cases were consolidated for trial.

The Trial

A trial was had before a jury in 1968. The Government proceeded to trial only on counts 1, 15, 19, 20, 25, 26, 30

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[1] Such references are to the Supplemental Appellants' Appendix, submitted with petitioners' petition for rehearing in the Court below, together with motion for leave to file the same.

In an order dated December 10, 1969, the Court below granted petitioners' motion for leave to file their Supplemental Appendix (Doc. 55). In its order denying the petition for rehearing, the Court below denied the motion (App. B, 14a).

and 31 of the first indictment, and only on counts 4, 5, 6, 11, 12 and 13 of the second indictment. The slides presented in connection with the first indictment showed a young man, nude, with an erect penis: the slides in connection with the second indictment showed nude males practising fellatio. The remaining counts were dismissed. (The indictments as submitted to the jury constitute Court's Exh. 2.)

Apparently none of the material seized at Hicks Street was introduced in evidence, and the officers did not testify about that search. However, Government witnesses did testify about the searches at the Wild and Corrado Pierrepont Street apartments, and boxes of color slides, rubber stamps, customer orders and order forms taken in such searches were received in evidence over petitioners' objections (App. A, 7a).

The Government introduced no evidence whatsoever that the materials which were allegedly obscene appealed to the prurient interest of homosexuals, nor to the prurient interest of the normal average person. The slides and advertisements were addressed to a male homosexual audience, with the fellatio slides being sent only to those who had expressed an interest in homosexual materials in the past. The Government did not introduce any evidence whatsoever to show that these materials went beyond the contemporary community standards of either the homosexual or heterosexual community. Petitioners noted repeatedly that there was no such proof (SM 104-106, 345-6, 350)*, claimed constitutional insufficiency in the Government's case, and again urged these points in their post-trial motions.

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* Such references are to the trial minutes, constituting Docs. 42-49 of the original record on appeal.

The Government, during colloquy on lack of proof of obscenity of the slides, stated:

> "Obviously, the deviate group finds this quite nice. It is not obscene in their eyes". (SM 104-5; 5a).

Defendants moved for a judgment of acquittal, citing lack of proof of obscenity (SM 345-353). The motion was denied.

After petitioner's case, the Court charged the jury that:

> "* * * the government says that in doing this [distributing the brochures] they [petitioners] were trying to reach people to look at the slides, these very offensive slides, and you may consider that as a relevant factor in considering whether you find them to be obscene" (SM 718; 18a-19a).

No objection was made to the charge.

Defendants were found guilty on all submitted counts. Defendants moved to set aside the verdict, citing *inter alia* the lack of proof of obscenity. The motion was denied (SM 1-2 [on sentence]). Petitioner Wild was sentenced to two years on each count (concurrent); petitioner Corrado received a suspended sentence, with two years' probation (Docs. 23, 24, 39, 40).

Timely appeal was taken to the United States Court of Appeals for the Second Circuit, which affirmed the conviction (App. A). After inviting the Government to respond to petitioners' timely petition for rehearing, the Second Circuit denied the petition, but stayed the mandate (App. B). This Petition follows:

The basis for jurisdiction in the court of first instance was 18 U.S.C. §3231.

Reasons Why The Writ Should Be Granted

POINT I

The Court below decided questions of federal law which have not been, but should be settled by this Court, and has indeed decided them in a way in conflict with applicable decisions of this Court.

The implications of the decision below are vast. It permits the determination of obscenity of pictures depicting male homosexual activities, directed solely to a male homosexual audience, to be determined by a presumably heterosexual jury in the absence of any evidence as to the effect or appeal of these materials upon or to homosexuals, despite the concession of the Government that homosexuals find these materials quite nice and not obscene. In upholding the convictions, the Court below further relied heavily upon "pandering", despite the trial court's patently erroneous charge that merely attempting to sell material in itself constitutes evidence of the material's obscenity. In so doing, we believe the Court below has decided federal questions in a way in conflict with applicable decisions of this Court; in any event, if the decision below is not in conflict with prior decisions of this Court, it decided important questions which have not been but should be settled by this Court.

Thus, in *Ginsberg* v. *New York,* 390 U. S. 629 (1968), this Court expanded the variable obscenity test, holding constitutional the New York criminal obscenity statute prohibiting sales to minors of material defined to be obscene on the basis of its appeal to such minors. Since material addressed to a particular audience may be found to be obscene on the basis of what appeals to that audience, as in *Ginsberg, supra,* and as in *Mishkin* v. *New*

York, 383 U.S. 502 (1966), the question arises of whether obscenity can be adjudicated on the basis of appeal to a group other than the group to which the material is addressed.[2] And if obscenity is to be adjudged solely on the basis of appeal to a deviant group, can obscenity be adjudged on the basis of a court finding—without evidence—that the material so appeals, despite the concession of the Government that the deviant group finds this material quite nice, and that it is not obscene in their eyes?

Such are the questions raised here. We submit that they are of importance and worthy of review by this Court.

In *United States* v. *Klaw,* 350 F. 2d 155 (2d Cir. 1965), the Second Circuit earlier had ruled that an obscenity conviction cannot stand in the absence of evidence of prurient stimulation and response, especially when the material is addressed to a deviant group, since the reactions of such a segment of society are hardly a matter of common knowledge. The Court below distinguished *Klaw* on the ground that the materials here were blatant—but nonetheless, there is not a scintilla of evidence in the record to show the appeal of such material to the male homosexual group or their response, save for the Government's admission that male homosexuals do not find this material obscene, but find it quite nice. However, in so finding, we submit, the Court by iself may not decide that material is obscene in the absence of evidence "as to what contem-

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[2] Even in the classic *Hicklin test,* (1868) L. R. 3 Q. B. 360, the test of obscenity was whether the tendency "is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." Homosexual materials addressed to male homosexuals could hardly deprave and corrupt male homosexuals, nor is the material addressed to male homosexuals likely to reach any other audience, which would be supremely disinterested in it. Thus, even under *Hicklin,* this material could hardly have been ruled obscene.

porary community standards are with respect to material similar in content" to those at bar. *Poss* v. *Christenberry,* 179 F. Supp. 411, 417 (S. D. N. Y. 1959); Mr. Justice Frankfurther, concurring, in *Smith* v. *California,* 361 U. S. 147, 164-7 (1959). In the absence of evidence as to obscenity, the conviction violates due process, because it "finally rests upon conjecture, unsupported by anything of substance." *Liggett Co.* v. *Baldridge,* 278 U. S. 105, 114 (1928). And insofar as the determination rests "upon the strength of evidential facts not spread upon the record"—and that is all, indeed, that the determination below rests upon—, it denies "The fundamentals of a trial * * *." *Ohio Bell Tel. Co.* v. *Comm'n,* 301 U. S. 292, 300 (1937).

Both the high courts of Maryland and California have ruled that an obscenity conviction cannot stand in the absence of evidence that the materials affronted the standards of the community. The California court also held that there must be proof of appeal to prurient interest. *Dunn* v. *Maryland State Board of Censors,* 240 Md. 249, 257, 213 A. 2d 751, 754 (1965): *In re Albert J. Giannini,* 72 Cal. Reptr. 655, 446 P. 2d 535, 545, N. 11 (1968). In this day and age when lesbianism is graphically depicted upon the screen, when all sorts of sexual activities are described and detailed with utmost frankness and candor on the printed page, we submit that it is not open to Court or jury to determine that even the graphic materials in the case at bar are obscene upon their face.

Indeed, the conviction below was made in the absence of evidence, which itself violates due process. *Thompson* v. *Louisville,* 362 U.S. 199 (1960).[3]

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[3] The language quoted below from this Court's opinion is *Ginzburg, infra* (App. B, 4a) certainly did not legitimize findings of obscenity without proof thereof, especially where the material was addressed to a deviant group. When this Court spoke of regarding the materials as sufficient in themselves for determination of obscenity, it was speaking in the context of such materials absent evidence of pandering. This Court has simply never ruled on the question we present, for it has never been raised in any case reviewed by this Court.

Additionally, we contend that since the material was "quite nice" in the eyes of the deviant group to which it is addressed, that in itself make for redeeming social importance which takes it out of the pale of obscenity. *Roth* v. *United States,* 354 U.S. 476, 484 (1957). Moreover, insofar as the pictures underlying the first indictment were concerned, they at most showed nude males with penises which are not in complete repose: the decision below holding them obscene is thus in conflict with the decision of this Court in *Potomac News Co.* v. *United States,* 389 U.S. 47 (1967), reversing *United States* v. *56 Cartons Containing 19,500 Copies of Mag.,* 373 F. 2d 635, 640 (4th Cir., 1966).

The question raised also contains within it an important additional question: Whether materials which could well be obscene if disseminated to the community at large may yet be distributed with immunity to those who have a legitimate interest therein. These materials were not thrust upon an unwilling public, but were concededly aimed at male homosexuals (and post office officials posing as such) who found the materials quite nice and not obscene. Certainly, male homosexuals have a right to possess these materials even if they constitute hard core pornography. *Stanley* v. *Georgia,* 394 U.S. 557 (1969). An important question, therefore, before this Court is whether homosexuals have a First Amendment right to receive materials which do not appeal to their prurient interests, and whether defendants have the correlative First Amendment right to disseminate them, so long as they are disseminated without being obtrusively thrust upon someone who cannot avoid them, and not sold to children. If there be "pandering", does this matter when the thrust of the pandering is towards a group which does not find these materials to appeal to its prurient interest? Does the homosexual community not have the right to re-

ceive materials which are non-prurient as to it, even if prurient as to the hetorosexual community? More broadly stated, do the obscenity laws deprive a class of persons of the right to receive, and of the disseminator to disseminate thereto under controlled conditions, materials which are not prurient as to the intended recipients? Since the right of adults to receive materials non-prurient as to them has been upheld even though the material might be harmful to children [*Butler* v. *Michigan*, 352 U.S. 380 (1957)], the decision below is in conflict with this Court's decision in *Butler*.

As to the problem of "pandering", the Court below relied on the theory that, as in *Ginzburg* v. *United States*, 383 U.S. 463 (1966), evidence of exploitation of interest in pornography may support the determination that the advertised material was obscene. We suggest, however, that if the rule of *Ginzburg* be applied to a case where there is no evidence whatsoever of appeal to prurient interest, and where the "pandering" determination rests entirely upon advertising, it is unreasonable, arbitrary, and violative of the First and Fifth Amendments. We urge further that this Court's much-criticized "pandering" ruling in *Ginzburg* should be reexamined.

We believe with the California courts that materials cannot be made obscene by the sellers' pitch and come-on when they are not obscene *per se*. As was said in *People of tha State of California* v. *Rosakos*, 74 Cal. Rptr. 34:

> "The seller's statement cannot make that which is not obscene, obscene."[4]

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[4] Cf. the Second Circuit in *Klaw*, *supra*, 350 F. 2d at 166: "Nor should it be sufficient merely that the disseminator or publicizer thinks such appeal exists. The stimulation and reaction with which the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator."

We suggest that the pandering concept of *Ginzburg* must in all logic be restricted to its particular facts, that is, a total marketing campaign—not mere advertising—in which materials were constantly advertised as pornographic (at a time when, unlike the present, pornography was equated with obscenity),[5] and where the entire marketing campaign proceeded on the basis of attempts to have mailings postmarked from such significantly named cities as "Intercourse", "Blue Balls", and "Middlesex."

If *Ginzburg* not be so restricted to its facts, its concept is not only illogical, but dangerous. Mere advertising cannot make a book obscene: the book, and its contents, remain the same whatever the advertising therefor may be. Salacious, leering advertising of "Little Red Riding Hood" can no more make that an obscene book, then innocent advertising of hard-core pornography can render such material non-obscene. In short, a publication cannot be varied by the advertising therefor.

Were mere advertising *per se* to be permitted as a factor in determining the obscenity of the materials advertised, the advertised materials—though protected by the First Amendment—could be banned. Certainly, this was not the intent of this Court. For surely, if material be erotic, the public has a right to know—through advertising—that the material is erotic. Advertised material could not be condemned as obscene merely because the publisher, exercising First Amendment rights, truthfully described or indicated its erotic nature.

The present trend towards encouraging truthfulness in advertising would seem to mandate that truthfulness be

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[5] The circulars here did not characterize the materials advertised as obscene. The rather archly-worded circulars would probably have struck male homosexuals as humorous, though the record is silent on their appeal to or effect upon male homosexuals.

further assured by permitting freedom to truthfully describe erotic mateirals. To do otherwise puts a premium on dishonesty, for the person who truthfully described the contents of "Fanny Hill" in his advertising might then be convicted solely because of his honesty, whereas a dishonest purveyor who proclaimed, for example, that this was a "story of the plight of a maiden torn from her home in the early days of London, charmingly told," would go scot free. This could not have been the intent of this Court. Nor, indeed, does the idea of "pandering" by sexy advertising stand up in the sexually-oriented advertising world of today, whatever may have been the situation when Ginzburg was disseminating his material.

In any event, the charge to the jury, permitting an inference of obscenity based upon the mere fact that the petitioners were attempting to market the slides, was clearly erroneous. While the Court below did not consider this question because no objections to this charge had been raised at trial, we submit that there is ample authority for review here of such a clearly erroneous, highly prejudicial, and patently unconstitutional charge. *Terminiello* v. *Chicago,* 337 U.S. 1 (1949).

Questions 1, 2 and 3 (*supra* pp. 2-3) are plainly deserving of review, especially in the present chaotic state of the laws governing "obscenity."

POINT II

This Court should grant review to determine the substantial constitutional question of whether, in an obscenity case, massive materials may be searched for and seized as incident to an arrest, without prior adversary judicial determination of obscenity of the materials underlying the indictment or of others seized, and constitutionally used in evidence thereafter against the defendants at trial, in the complete absence of any procedure to ever recover nonobscene materials which are protected by the First Amendment.

The issue raised here is *not* merely whether an adversary judicial determination of obscenity is required prior to arrest,[6] or prior to seizure of materials as a prelude to prosecution thereon.[7] For here, the searches and seiz-

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[6] This Court's February 27, 1970 affirmance of *Milky Way Productions, Inc.* v. *Leary,* —— F. Supp. —— (S.D.N.Y. 1969), —— U.S. —— (1970), may have resolved this issue against requirement of hearing prior to arrest, at least in a state case. However, this is not certain, in the absence of an opinion, and with the continued pendency of the appeal here from *Delta Book Distributors, Inc.* v. *Cronvich,* 304 F. Supp. 662 (E.D. La. 1969) *sub. nom. Perez* v. *Ledesma,* No. 837, Oct. Term 1969. If the point be still open, we urge it here, for if the arrests were illegal, certainly the searches and seizures could not have been upheld as incident to illegal arrests.

[7] On February 27, 1970, this Court also denied review in *Bethview Amusement Park* v. *Cahn,* —— U.S. —— and *Vegari* v. *208 Cinema, Inc.,* —— U.S. —— (1970), which had held that there is such a constitutional requirement. These results were foreordained by *Lee Art Theatre, Inc.* v. *Virginia,* 392 U.S. 636 (1968).

ures at Pierrepont Street[8] were upheld and the fruits of such searches held to be admissible, on the theory that these were searches and seizures incident to arrest. The question thus arises as to whether *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964) and *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961) are to be limited to seizures of books only as a first step in civil proceedings seeking their destsruction, or whether seizures incident to an arrest in a criminal obscenity case must also be proceeded by a prior adversary judicial determination of their obscenity.[9]

In the oft-cited case of *United States* v. *Brown,* 274 F. Supp. 561 (S.D.N.Y. 1967, per Tyler, J.), Judge Tyler noted prior decisions holding that there are no such limitations:

> "* * * The standards laid down in those cases [*Kansas supra, Marcus, supra,* and Kingsley Books, Inc. v. Brown, 354 U.S. 436] would seem to be applicable to this motion. A search and seizure for the purpose of gathering evidence for a criminal obscenity prosecution imparts at least the same potential restraint on the dissemination of material protected by the First Amendment as one made solely for the purpose of commencing forfeiture proceedings. See Evergreen Review, Inc. v. Cahn, 230 F. Supp. 498, 504 (E.D.N.Y. 1964); Flack v.

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[8] As to the Hicks Street search, see n.10 *infra* at p. 19.

[9] In the absence of any procedure in a federal criminal case for securing the return of non-obscene materials seized as incident to an arrest—meaning that they are suppressed for all time without any opportunity for hearing thereon—, the only distinction between civil and criminal seizures incident to an arrest is that in the former, the works may be destroyed whereas in the latter they are forever suppressed from circulation. This result is *contra* to *Freedman* v. *State of Maryland,* 380 U.S. 51 (1965).

Municipal Court, 59 Cal. Rptr. 872, 429 P. 2d 192 (Cal. 1967)." (274 F. Supp. at 563).

"This result [suppression and return] cannot be avoided by the rubric of a search incident to a lawful arrest. As heretofore discussed, the Supreme Court has apparently determined that borderline speech must be protected by the application of relatively elaborate procedures prior to suppression via seizure. Such procedures are impossible to follow in a seizure incident to arrest. As the Supreme Court of California recently noted,

'within the precinct of the First Amendment, only the requirement that a search warrant be obtained prior to any search or seizure assures a free society that the sensitive determination of obscenity will be made judicially and not *ad hoc* by police officers in the field.' Flack v. Municipal Court, 59 Cal. Rptr. at 879, 429 P. 2d at 199." (274 F. Supp. at 565).

We urge that, at least in the Federal system of criminal justice, there is a pressing need for such a doctrine, as clearly demonstrated by the case at bar. Here, the officers searched for and seized everything related to the mail order business of petitioners; there could not have been a more massive seizure. Everything related to petitioners' business was taken. A general warrant permitting this would surely have been vacated; arrest without search warrant can hardly give the Government greater rights.

If, as has been held below, the mere fact of an arrest permits the prosecution to retain slides and brochures which are not obscene, then all searches and seizures incident to an arrest in an obscenity case, even of materials protected by the First Amendment, have been im-

munized from judicial scrutiny. All this without the materials having been passed upon by a Judge, even without a non-adversary hearing, such immunization apparently flowing from the mere *ex parte* Grand Jury determination that materials involved in the indictment were obscene. There is simply no remedy in the Federal judicial system for securing the return of materials protected by the First Amendment which were seized as incident to an arrest, even though such materials were at no time claimed to be obscene, or if the counts involving such materials were dismissed—and here, some two-thirds of the substantive counts were dismissed.

Moreover, much of the materials here were on the threshhold of dissemination [*Mishkin* v. *New York,* 383 U.S. 502, 513 (1966)], as shown initially by the fact that the seized materials constituted everything belonging to the business, plus the fact that they also contained mailing lists, customers' names and addresses, at least one shopping bag with circulars ready for mailing, another shopping bag filled with addressed envelopes, a post office department hamper of miscellaneous photos and slides and two U.S. mail sacks of miscellaneous photos and slides (*supra,* pp. 5-6). However, in a case such as this, where the materials seized incident to arrest consisting of slides and circulars may be kept forever by the Government under the decision below, even when not obscene, the imminence of distribution at the time of the arrest would seem to be rather irrelevant. [10]

A still further serious question is whether evidence consisting of materials protected by the First Amendment is to be treated in the same fashion as evidence of

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[10] A paradoxical situation arises from the Hicks Street search, consented to by Corrado. Surely he did not consent to retention forever of the seized materials. Yet the decision below so converts the consent.

the more normal type of "contraband", such as drugs, proceeds of crime, etc.[11] The Court below applied this Court's decision in *Warden* v. *Hayden,* 387 U.S. 294 (1967) to the materials taken here. *Warden* v. *Hayden* did not involve the seizure of materials protected by the First Amendment; the guidelines must be different where such materials, and related materials—the means of fabrication and distribution of First Amendment materials—are involved. Otherwise, as here, a First Amendment venture could be put out of business if only one or more of its publications were found obscene.

The Court below ordered that items other than slides and brochures should have been returned by the Government upon demand after conviction, but that the slides and brochures should be retained. Though the Court did not condone retention of items other than slides and brochures, it failed to see how this could affect the validity of petitioners' convictions (App. A, 8a). Our response

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[11] *United States* v. *Brown, supra,* 274 F. Supp. at 563:

> "The government's main contention on the merits is that the seizure was made pursuant to a valid search warrant. Alternatively, they contend that it was made incident to a lawful arrest. Were this a typical case of a seizure of contraband, I would assume *arguendo* that it could be sustained on either ground. See United States v. Ventresca, 380 U.S. 102 * * * (1965); United States v. Beigel, 254 F. Supp. 923 (S.D.N.Y. 1966), *aff'd,* 370 F.2d 751 (2d Cir. 1967). But alleged obscenity cannot be treated as mere contraband. Marcus v. Search Warrant, 367 U.S. 717, 730-31 * * * (1961); A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 211-12 * * * (1964). '(T)he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn * * *. The separation of legitimate from illegitimate speech calls for * * * sensitive tools * * *.' Speiser v. Randall, 357 U.S. 513, 525 * * * (1958)."

is that the seizures violated the First, Fourth and Fifth Amendment rights, especially in the absence of any means for securing return of non-obscene materials, and that therefore none of the seized materials could have been constitutionally used against petitioners. Therefore the convictions should be set aside.

The questions presented under Point II are novel and important, as is our Question 5, whether *Chimel* v. *United States,* 395 U. S. 752 (1969) is to be fully prospective only, as held by the Court below (App. A, 8a). We believe that it has not heretofore been pointed out to this Court that no remedy whatsoever exists for securing the return of non-obscene materials seized as incident to an arrest; this consideration in and of itself would seem to warrant review here.[12]

CONCLUSION

The Court should grant *certiorari* and reverse the convictions below.

Respectfully submitted,

HERBERT MONTE LEVY,
Attorney for Petitioners.

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[12] The Government has not yet arranged for the return of items other than the slides and brochures. Nor have we pressed for such return; in such a completely new area of law, we do not wish to lock horns with the Government, lest our pressing for the return of the photographic equipment and accepting such be construed as a waiver of the right to assert illegality in the seizures.

APPENDIX A

Opinion of the United States Court of Appeals For the Second Circuit

Nos. 76-79—September Term, 1969.

(Argued September 11, 1969 Decided October 29, 1969.)

Docket Nos. 32510-32513

UNITED STATES OF AMERICA,

Appelle,

—v.—

EDWARD A. WILD, JR. and LOUIS CORRADO,

Appellants.

Before:

LUMBARD, *Chief Judge,* and
SMITH and FEINBERG, *Circuit Judges.*

Defendants were convicted in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *J.*, of mailing obscene matter and conspiring to do so and they appealed. The Court of Appeals held that the matter was obscene and that searches and seizures conducted by post office inspectors and deputy marshals were proper.

Affirmed.

Appendix A

LUMBARD, *Chief Judge:*

Edward A. Wild, Jr., and Louis Corrado appeal from their convictions by a jury in the Southern District of New York of violating the Comstock Act. 18 U.S.C. §1461. They were found guilty of conspiracy to use the mails for conveyance and delivery of obscene color slides and photographs and of numerous mailings of obscene color slides and information regarding how to obtain them. Wild was sentenced to two years imprisonment; the execution of a similar sentence upon Corrado was suspended, and he was placed on probation for two years.

The appeals raise two questions: whether the slides are in fact obscene and whether the searches and seizures conducted by postal inspectors and deputy marshals were proper. As we find that the slides and photographs are obscene and that the material which was introduced in evidence against the appellants was properly seized, we affirm the convictions.

The question of obscenity can be disposed of merely by stating that these slides are unquestionably hard core pornography. The color slides which prompted prosecution were of two general types. The first group presented a nude male, seated or lying facing the camera, holding or touching his erect penis. The second group of slides depicts two nude males in the act of fellatio.

There is no conceivable claim that these color slides have redeeming social value, and none was made. With regard to the other two elements which the Supreme Court has specified must be present for a finding of obscenity—appeal to the prurient interest of the group likely to receive the allegedly obscene material and patent offensiveness under contemporary community standards—the

appellants argue that the Government introduced no evidence other than presenting the slides themselves. More specifically, appellants contend that the slides were designed for a male homosexual audience and that the jury was unable to decide whether there was an appeal to the prurient interest of that group without expert testimony.

We do not believe, as appellants in effect urge, that the Constitution requires the Government to produce expert testimony about appeal to the prurient interest and contemporary community standards in every obscenity case. *Compare* Frankfurter, *J.*, concurring in *Smith* v. *California,* 361 U.S. 147, 164-7, *with* Harlan, *J.*, concurring in part and dissenting in part, *Id.,* at 170-1. It is clear that such testimony can be necessary on certain facts such as those presented in *United States* v. *Klaw,* 350 F. 2d 155 (2d Cir. 1965), heavily relied on by appellants. However, the present case presents no such peculiar problems of proof.[1]

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[1] *Klaw* involved allegedly obscene booklets containing stories, drawings, and photographs in the "bondage" genre, described to the Court as "sado-masochistic." 350 F.2d at 157. In describing the problems confronting a jury which had to judge obscenity without any evidence other than the booklets themselves, the Court stated:

> ". . . the jury had insufficient evidence even to 'recognize that the material appealed to the prurient interest of the average person. It had absolutely no evidentiary basis from which to 'recognize' any appeal to the prurient interest of the deviate or the typical recipient—a class never really defined in the record." 350 F.2d at 168.

We think the class of recipients in the present case was clearly defined, and we believe that the slides—graphic as they are—provided sufficient basis for deciding about appeal to the prurient interest of that group.

Appendix A

We hold that in cases such as this the trier of fact needs no expert advice. As noted above, there was no claim of redeeming social importance. Cf. *United States* v. *A Motion Picture Entitled "I Am Curious-Yellow,"* 404 F.2d 196 (2d Cir. 1968). One group of slides graphically depicts a sexual act and the other group focuses attention on the erect genitalia of the nude male models. In this context, the issues of prurient appeal and offensiveness to contemporary community standards can be dealt with by a jury without expert help. As the Supreme Court has stated, "in the cases in which this Court has decided obscenity questions since *Roth,* it has regarded the materials as sufficient in themselves for the determination of the question." *Ginzburg* v. *United States,* 383 U.S. 463, 465 (1966). Simply stated, hard core pornography such as this can and does speak for itself.[2]

In a remarkably similar case in which a conviction under section 1461 was unanimously affirmed, Judge Prettyman wrote:

> Most of the difficulty which enshrouds the discussion of the law concerning obscenity and filth develops upon consideration of books and magazine articles. Here arise problems of scienter, the meaning and effect of the whole, the value of the work to proper interests of the public, the contemporary

[2] The phrase "hard core pornography" has been widely used. Justice Stewart remarked "I know it when I see it." *Jacobellis* v. *Ohio,* 378 U.S. 184, 197 (1964) (concurring opinion). In discussing this comment, Professor Freund recently stated: "What I believe Justice Stewart to mean is the sort of thing that strikes you patently, the filthy picture, the stag movie, perhaps the string of obscene words without much in between." P. Freund, *Political Libel and Obscenity,* 42 F.R.D. 437, 503 (1966).

> community standards in similar matters, and other baffling problems under our precious right of free speech, discussed in the several opinions in Smith v. ~~California. But we have no such problem in the case at bar. These are stark, unretouched photographs—~~ at bar. These are stark, unretouched photographs no text, no possible avoidance of *scienter*, no suggested proper purpose, no conceivable community standard which would permit the indiscriminate dissemination of the material, no alleviating artistic overtones. These exhibits reflect a morbid interest in the nude, beyond any customary limit of candor. They are 'utterly without redeeming social importance.'
>
> * * *
>
> We think that photographs can be so obscene—it is conceivably possible that they be so obscene—that the fact is uncontrovertible. These photographs are such. United States v. Womack, 294 F.2d 204, 205-6 (D.C. Cir.) (footnote omitted), *cert. denied* 365 U.S. 859 (1961).

See also, *United States* v. *Kahm*, 300 F.2d 78 (5th Cir.), *cert. denied* 369 U.S. 859 (1962); *United States* v. *Davis*, 353 F.2d 614 (2d Cir. 1965), *cert. denied* 384 U.S. 953 (1966). Cf. *Manual Enterprises* v. *Day*, 370 U.S. 478, 489-90 and n. 13 (1962) (opinion of Harlan, *J.*). Judge Bonsal's charge to the jury properly defined obscenity in light of the relevant Supreme Court cases; the jury was capable of applying those tests to this material.

Finally, we note that appellants' own evaluation of the slides confirms the finding of appeal to the prurient interest. *Mishkin* v. *New York*, 383 U.S. 502, 508 (1966); *Ginzburg* v. *United States*, 383 U.S. 463 (1966). In considering the slides, the jury had before it brochures which

the appellants had mailed out along with sample slides. These advertisements seem to us to constitute the type of pandering which is relevant to a determination of obscenity. Although appellants contend that Judge Bonsal's charge on the issue of pandering was improper, no such objection was made to this portion of the charge at trial and we need not consider it here. *United States* v. *Re*, 336 F.2d 306, 316 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964). Fed. R. Crim. P. 30.

Appellants' other main contention is that the search and seizure of materials without a search warrant in an obscenity case violates their rights under the First, Fourth, and Fifth Amendments. Both appellants were arrested on December 1, 1965, in an apartment building on Pierrepont Street in Brooklyn where they resided. The arrests were made pursuant to bench warrants issued following the indictment, and appellants do not dispute the lawfulness of their arrests. As an incident to the concededly lawful arrests, postal inspectors and deputy marshals immediately conducted searches of both the Wild and Corrado apartments where the arrests took place. In addition, the officers interrupted their search of Corrado's apartment and went with Corrado to a third apartment—an "office" on Hicks Street in Brooklyn—and searched there. After completing the search at Hicks Street, Corrado and the officers returned to the Corrado apartment and completed the search begun there earlier.

A number of items were seized at each apartment: cameras, projectors, and other photographic equipment, film, slides, order forms, advertising brochures, customer records, envelopes, and rubber stamps bearing the names of mail order businesses operated by appellants.

Appendix A

On February 2, 1966, appellants filed a notice of motion to suppress and return the items seized. A suppression hearing was held on March 30 and 31, 1966, and the parties submitted affidavits and memoranda on the motion up until September 15, 1967. On that day, Judge Murphy denied the motion, holding that the search at Hicks Street was consented to by Corrado and that the searches at Pierrepont Street were valid as incident to lawful arrests. Judge Murphy stated that the validity of the searches "depends upon whose testimony is accepted and we have no hesitancy in saying that we accept the testimony of the deputy marshals and Post Office inspectors and reject that of Corrado and Wild."[3] The motion to suppress was apparently reasserted just prior to trial. Our review of the trial record indicates that none of the material seized at Hicks Street was introduced in evidence and the officers did not testify about that search; however, Government witnesses did testify about the searches at the Corrado and Wild Pierrepont Street apartments, and boxes of color slides, rubber stamps, customer orders and order forms—mostly from Corrado's apartment—were offered in evidence. Judge Bonsal received them in evidence, over defendant's objection, and we hold that his action was proper.

It has been held that items such as those received in evidence at appellants' trial may be seized incident to a lawful arrest in an obscenity case. *United States* v. *Klaw*, 227 F. Supp. 12 (S.D.N.Y. 1964), *rev'd on other grounds*, 350 F.2d 155 (2d Cir. 1965). In *Klaw*, Judge Wyatt relied primarily on *United States* v. *Rabinowitz*, 39 U.S. 56

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[3] Memorandum Opinion and Order No. 34012 (September 15 1967).

(1950), a case which has recently been overruled by the Supreme Court. *Chimel* v. *California,* 395 U.S. 752 (1969). However, we have recently held *Chimel* to be fully prospective in *United States* v. *Bennett,* —— F.2d ——, slip. op. 3357 (2d Cir. September 9, 1969), and thus it has no application to the present case. We hold that the search incident to arrest was proper under *Rabinowitz.* See also, *Harris* v. *United States,* 331 U. S. 145 (1947).

There can be no dispute that the materials taken and used at trial were subject to seizure. Not only did they appear to be "instrumentalities and means" of the crime, see *Klaw, supra,* 227 F. Supp. at 15-17, but they were also "mere evidence", the seizure of which incident to arrest was held proper in *Warden* v. *Hayden,* 387 U.S. 294 (1967).

The items not used in evidence at the trial have apparently been retained by the Government. Some of this material, such as the slides and brochures, may be retained as contraband. *Trupiano* v. *United States,* 334 U.S. 699, 710 (1948). However, other items—particularly the photographic equipment that was seized—should have been returned by the Government at least when appellants' counsel on appeal made an oral demand upon the Assistant United States Attorney after the convictions were obtained. While we do not condone overlong detention of such items, we fail to see how this can affect the validity of appellants' convictions.

In conjunction with the specific claim that the items seized should have been suppressed, appellants present a broader argument that seizures in an obscenity case without a prior adversary hearing on the issue of obscenity are unconstitutional under *A Quantity of Books* v. *Kansas,* 378 U.S. 205 (1964), and *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961). These cases are inapposite since

they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction. The seizures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe *Marcus* and *A Quantity of Books* can be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases. See *Milky Way Productions, Inc.* v. *Leary, New York Feed Co., Inc.* v. *Leary,* —— F. Supp. —— (S.D.N.Y. October 15, 1969) (three-judge court, mimeographed copy of opinion, pp. 18-22).

Judgments of conviction affirmed.

APPENDIX B

Opinion on Rehearing of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-79—September Term, 1969).

(Decided February 2, 1970.)

Docket Nos. 32510-32513

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWARD A. WILD, JR. and LOUIS CORRADO.

Appellants.

Before:

LUMBARD, *Chief Judge,*

SMITH and FEINBERG, *Circuit Judges,*
On Petition for Rehearing of Defendants
Edward A. Wild, Jr. and Louis Corrado

PER CURIAM:

Appellants have petitioned for rehearing of our decision in *United States* v. *Wild*, slip op. 247 (2d Cir. Oct. 29, 1969), claiming that we have overlooked an intervening decision of another panel of this court, that we have incorrectly stated their legal position and that the arrests of appellants were unlawful.

Appendix B

The intervening decision referred to is *Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (2d Cir. 1969), decided after the date of argument in this case but some three weeks before our decision. *Bethview* grew out of a criminal prosecution for "Obscenity" under New York State Penal Law §235.05(1), (2). Armed with search and arrest warrants, police officers arrested plaintiffs in that case and seized a print of an allegedly obscene motion picture film. Plaintiffs brought suit in the United States District Court for the Eastern District of New York and obtained an order requiring the return of the film. We affirmed on the ground that an adversary hearing on the issue of obscenity was necessary before the film could be seized by the police. Appellants claim that the decision in *Bethview* is "in irreconcilable conflict" with our decision here.

We do not agree with that conclusion. First, the *Bethview* court did not have before it an appeal from a conviction in which the seized film had been introduced into evidence; therefore, it did not hold that such a conviction would have to be reversed. While the panel there ordered the film returned, it did not say that the print could not be used by the prosecution in a trial on the outstanding criminal charge. In fact, the court in *Bethview* indicated precisely to the contrary, 416 F.2d at 412:

> The appellants contend that a print of the motion picture is needed for purposes of prosecution. There are a number of ways in which this can be accomplished without seizure of the film. The court can direct that a print be made reasonably available to the prosecution; a subpoena duces tecum can be used.
>
> Finally it is suggested that unless the police or other local authorities have actual possession of

> the film pending the required adversary proceeding, the distributor may take advantage of the delay, for example, by shipping the film out of the jurisdiction or by cutting out the offending scenes. If there is a real threat of such activity it can be controlled by an ex parte restraining order.

See *Tyrone, Inc.* v. *Wilkinson,* 410 F. 2d 639, 641 (4th Cir. 1969), cert. denied, 38 U.S.L.W. 3222 (U.S. Dec. 15, 1969). In our case, the issue is whether a new trial must be ordered because some of the seized material was used as evidence.[1] We do not believe that *Bethview* decided that question in the affirmative.

Second, the *Bethview* panel analogized "a single print of a motion picture film" to seizure of "a large number of books" because in both instances, without any prior adversary hearing, a large group in the community is denied access to material that may be entitled to first amendment protection. Thus, the *Bethview* panel pointed out that a single motion picture print could be seen by over 4,000 people in one week. This is not true of other kinds of allegedly obscene material, e.g., a single copy of a magazine or of an underground newspaper, cf. *Milky Way Productions, Inc.* v. *Leary,* —— F.Supp. —— (S.D.N.Y. 1969), or a single copy of a slide similar to those involved here. The *Bethview* panel did not hold that it is improper, after a lawful arrest, to seize as evidence a few samples of this kind of allegedly obscene material, each of which can, by its nature, be seen by only a few people. In other words, the *Bethview* panel, as did we, looked to the rationale of

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[1] We note that only appellant Wild raises this point. Appellant Corrado "would prefer to have the conviction affirmed as to him rather than to undergo a new trial." Appellants' brief, p. 25.

Appendix B

A Quantity of Books v. *Kansas,* 378 U.S. 205, 210-11, 213 (1964), and *Marcus* v. *Search Warrants,* 367 U.S. 717 (1961), which proscribed, as we pointed out, slip op. 255, "massive seizure of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction." As we stated in our opinion, *id.,* we do not believe that those cases "proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases," e.g., by seizing as incident to a lawful arrest evidentiary samples of allegedly obscene material. Accordingly, we conclude that our decision and *Bethview* are not in conflict.

In their petition for rehearing, supplemented by a motion for leave to file a supplemental appendix, appellants argue that "thousand of slides" were seized here, thus making this case a "massive seizure" within the rationale of *Quantity of Books, Marcus,* and *Bethview.* However, the argument made to us on appeal was that "any seizure" [2]—small or massive—was unconstitutional if made without a prior hearing. As indicated, we reject that contention. As to whether the search and seizure here was so "massive" as to be prohibited by the first amendment, we simply are not furnished with adequate facts. The proffered supplemental appendix may indicate what was taken but does not show what was left, nor can we tell whether the seizure included all—or merely some—copies of a particular slide, how many separate slides were involved, or whether they "were on the threshold of dissemination." See *Mishkin* v. *New York,* 383 U.S. 502, 513 (1966). In short, we do not think it appropriate to decide the issue now raised of

[2] Appellants' brief, p. 21.

"massive seizure" and the constitutional implications thereof on a belated argument and inadequate record. Accordingly, we deny leave to file the supplemental appendix.

The remaining issues in the petition for rehearing require little discussion. We did state twice in our opinion that appellants did not claim that the color slides had redeeming social value. Appellants point out, however, that their brief did make the claim. Accordingly, we amend the opinion by adding the phrase "at trial" at the end of the sentences beginning at slip op. 249, line 4, and slip op. 250, line 2. Despite what appellants may claim, we adhere to our prior conclusion, implicit in our opinion, that the slides have no redeeming social value. Appellants' last point that their arrests were unlawful was dealt with in our opinion and is concededly brought to our attention again only "to protect" the record.

The petition for rehearing is denied. The motion to stay the mandate pending the filing of a petition for a writ of certiorari is granted, subject to the requirements of Fed. R. App. P. 41(b).

APPENDIX C

Opinion of Murphy, *J.* (S.D.N.Y.) on Motions to Suppress

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

against

EDWARD A. WILD, JR., *et al.*,

Defendant.

MURPHY, D. J.

Although the hearing on these motions to suppress was held on March 30-31, 1966, the time for the filing of the government's brief was continuously adjourned until very recently.

There were three searches, two in different apartments at No. 146 Pierrepont Street, Brooklyn, and one at #55 Hicks Street, Brooklyn. The search of #55 Hicks Street was freely and voluntarily consented to by Corrado, despite his testimony that it was the result of intimidation and duress. The written evidence demonstrably confirms this fact.

The searches of the apartments of Wild and Corrado at the Pierrepont Street address we hold were valid as incidents to lawful warrants of arrest. In the final analysis, the validity of the searches depends upon whose testimony is accepted and we have no hesitancy in saying that we accept the testimony of the deputy marshals and Post Office inspectors and reject that of Corrado and Wild.

Appendix G

Accordingly, the motions to suppress are denied. These are orders. No settlements are necessary.

THOMAS J. MURPHY
U.S.D.J.

Dated, New York, N. Y., September 15, 1967.

APPENDIX D

Constitutional Provisions and Statute Involved

First Amendment

"Congress shall make no law * * * abridging the freedom of speech, of the press; * * *"

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *"

Fifth Amendment

"No person shall * * * be deprived of * * * liberty, or property, without due process of law; * * *"

Federal Obscenity Statute

18 U.S.C. §1461; June 25, 1948, ch. 645, 62 Stat. 768; June 28, 1955, ch. 190, §§1, 2, 69 Stat. 183; Aug. 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962)

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance and—

* * *

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made * * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier.

Appendix D

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1278

EDWARD A. WILD, JR. and LOUIS CORRADO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of mailing obscene matter and of conspiring to do so, in violation of 18 U.S.C. 1461. Petitioner Wild was sentenced to two years' imprisonment; petitioner Corrado to two years' probation. The court of appeals affirmed (Pet. App. 1a-9a), and thereafter denied a petition for rehearing with a further *per curiam* opinion (Pet. App. 10a-14a). In maintaining that petitioners' convictions were

correctly upheld by the court below, we rely primarily upon the comprehensive opinions written by that court. Some additional discussion would, however, appear to be in order.

1. A principal contention made by petitioners is that the government's proof on the issue of obscenity was insufficient, since the government relied on the materials themselves and did not introduce expert testimony. As the court of appeals properly concluded, the Constitution does not require the government to "produce expert testimony about appeal to the prurient interest and contemporary community standards in every obscenity case" (Pet. App. 3a). In the present case, the court below correctly found that there was no such necessity since the materials themselves constituted "hard core pornography" (Pet. App. 4a). The materials involved here were color slides, not written or printed matter. As described by the court below, the first group of slides "presented a nude male, seated or lying facing the camera, holding or touching his erect penis. The second group of slides depicts two nude males in the act of fellatio" (Pet. App. 2a). There was in these circumstances no need for expert help to enable the jury to decide the issues of patent offensiveness, redeeming social value and appeal to prurient interest of the clearly defined class (*i.e.*, homosexuals) for which the slides were intended. See *Ginzburg* v. *United States*, 383 U.S. 463, 465; *Mishkin* v. *New York*, 383 U.S. 502.[1] As this Court made clear in

[1] We note that petitioners' challenge to the trial court's instructions (see Pet. 8, 13-15) was correctly rejected by the

Stanley v. *Georgia*, 394 U.S. 557, the decision in that case does not give First Amendment protection to "commercial distribution of obscene material" (394 U.S. at 563-564).

2. Petitioners' second major contention is that the seizure of the color slides (and other evidence such as rubber stamps, customer orders and order forms) —which took place prior to the decision in *Chimel* v. *California*, 395 U.S. 752—was unlawful. The seizure of material introduced at trial took place in petitioners' apartments incident to their arrests, which were made pursuant to bench warrants. The officers did not possess a search warrant. Petitioners contended below and argue here that the Constitution forbids the seizure of *any* allegedly obscene articles and associated evidence incident to arrest.[2] The court of appeals held that, under the standards prevailing before the *Chimel* decision, neither the Fourth nor the First Amendment absolutely prohibited the

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court below since not raised at trial (Pet. App. 6a). At all events, the instruction was proper under *Ginzburg* v. *United States*, *supra*.

[2] Petitioners also allege that the seizure in this case was improper because "massive" in scope under such cases as *A Quantity of Books* v. *Kansas*, 378 U.S. 205, and *Marcus* v. *Search Warrant*, 367 U.S. 717. As the court of appeals pointed out, however (Pet. App. 13a-14a), petitioners raised no claim regarding the extent of the seizure as opposed to the the legitimacy of *any* seizure, "small or massive," until their petition for rehearing below. In these circumstances, the court below, finding the record inadequate on this issue, properly declined to pass upon this fact-related contention, and the question is thus not appropriately before this Court (Pet. App. 10a-14a).

seizure of obscene material and related articles, such as those involved here. The court below then proceeded to sustain the instant seizure, holding that *Chimel* was not retroactive in effect and that the scope of the search and seizure here did not exceed permissible bounds under previous decisions (*e.g.*, *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145).

In our view, the court below correctly applied the basic holding in *Chimel*—that, in ordinary circumstances, officers may incident to an arrest search for and seize only objects in an area immediately adjacent to an arrestee—in a wholly prospective fashion. We recognize, however, that the question of the retroactivity of *Chimel* is presently pending in *Elkanich* v. *United States*, No. 1142, this Term, certiorari granted, February 2, 1970, and *Williams* v. *United States*, No. 1125, this Term, certiorari granted, March 23, 1970.[3] Accordingly, the Court may wish to defer action on the present petition until after *Elkanich* and *Williams* have been decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1970.

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[3] *Elkanich* involves a collateral attack on a conviction which had become final before *Chimel* was decided. *Williams*, however, presents the question of the retroactivity of *Chimel* in a case, like the instant one, that was on direct review when *Chimel* was decided (and of course is still on direct review).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 104

EDWARD A. WILD, JR. and LOUIS CORRADO,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Edward A. Wild, Jr. and Louis Corrado, hereby petition for a rehearing of this Court's May 17, 1971 denial of a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, which had affirmed their convictions for mailing obscene materials (now reported at 422 F.2d 34).

The decision in the case at bar, despite the attempts of the Court below to reconcile it with the decision of a dif-

ferent panel of the same Court in *Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (2nd Cir. 1969), *cert. den.,* 397 U.S. 920, is basically irreconcilable therewith. Since then, the decisions of other Circuits, as well as of three-judge Federal Courts, have expressly or impliedly repudiated or distinguished away (on untenable grounds) the decision below.

Thus, in the three-judge Federal Court case of *Carroll* v. *City of Orlando,* 311 F. Supp. 967, 970 (M.D. Fla., 1970), the dissenting judge relied upon *Wild* in upholding his position, while the majority relied upon *Bethview.* Similarly, in *United States* v. *Alexander,* 429 F. 2d 1169 (8th Cir., 1970) the Eighth Circuit rejected the view that samples of materials could be taken at an obscenity arrest if only some of the titles seized had been before the officer who issued the warrant—while here the seizure had been made without any warrant whatsoever.

Conversely, the decision below has been cited with approval by the Fifth Circuit for the proposition that hard core obscenity may be seized without prior hearing [*United States* v. *Fragus,* 428 F. 2d 1211, 1212 (5th Cir., 1970)], a dangerous extension of *Wild.*

The Ninth Circuit, meanwhile, has distinguished *Wild* upon the tenuous basis that distribution and sale may be treated differently than material held for exhibition. *Demich, Inc.* v. *Ferdon,* 426 F. 2d 643, 645 (9th Cir., 1970).

The Second Circuit itself has apparently narrowed the rule of *Wild.* Thus, in *United States* v. *Marti,* 421 F. 2d 1263, 1271 (2nd Cir. 1970), it held that a warrantless seizure of an automobile on the ground that it was allegedly carrying obscene materials could not be justified, and that the evidence seized could not be admitted at trial. And in *Astro Cinema Corp., Inc.* v. *Mackell,* 422 F. 2d 293, 296 (2nd Cir. 1970), it further narrowed the decision below:

> "* * * We view *Wild* as merely saying that a particularized search for specific samples of slides or publications, designed to provide evidence for a subsequent obscenity prosecution, and not substantially restraining distribution of the material involved, does not violate *Marcus* or *A Quantity of Books.* * * *"

The continued existence of *Wild* as a precedent, if unreviewed by this Court, will thus continue to create confusion. While the Second Circuit itself narrows *Wild* (to a point unsupportable by the record and opinion below)[1], the majority of a three-judge Federal Court apparently rejects *Wild* altogether, and other Courts of Appeal rely upon expansions or contractions of *Wild*. Unless reviewed by this Court, *Wild* is likely to create a cancer in law enforcement. It has been productive of much confusion and varying results in its less than two years of existence, and should be reviewed by this Court.

In another aspect, too, this case deserves review. Though *Williams* v. *United States,* —— U.S. —— (1971), 39 LW 4365, precludes us from further argument of the *Chimel* v. *California,* 395 U.S. 752 (1969) point, we note that with this Court's dismissal of *Perez* v. *Ledesma,* —— U.S. —— (1971), 39 LW 4214, on procedural grounds, this Court no longer has before it the question of whether a prior adversary judicial determination of obscenity must be made before allegedly obscene materials may be seized without warrant as incident to an arrest, and used as evidence. This case squarely presents such an issue, con-

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[1] The search below was not for specific samples. On the contrary, the officers were taking anything they saw "Related to [Wild's] business. Their photographic equipment, slides, circulars advertising his business, envelopes, things like that." (Doc. 16, p. 166).

tained in our Question 4. We submit that since this question was held worthy of review in *Perez,* it should be granted review herein. This question is now ripe for decision.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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295 Madison Avenue
New York, New York 10017

Certificate of Counsel

HERBERT MONTE LEVY, counsel of petitioners Wild and Corrado, hereby certifies that the within petition is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioners although not previously presented.

HERBERT MONTE LEVY

Dated: June 2, 1971